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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

JURISDICTIONAL STATEMENT FILED OCTOBER 11, 1969
PROBABLE JURISDICTION NOTED JANUARY 12, 1970

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List of Docket Entries

1. July 14, 1969, Amended Complaint filed.

2a. September 17, 1968, Affidavit of Lynn S. Castner filed.

2b. September 17, 1968, Affidavit of Betty M. Smith filed.

2c. September 17, 1968, Affidavit of Michael Zagarell filed.

2d. September 17, 1968, Affidavit of James Erickson filed.

2e. September 17, 1968, Affidavit of Elmer Borman filed.

2f. September 17, 1968, Affidavit of Trygve Larsen filed.

2g. September 17, 1968, Affidavit of Earl Sorg filed.

2h. September 17, 1968, Affidavit of Mrs. Lynn Stein filed.

2i. September 17, 1968, Affidavit of Fred Matsch filed.

2j. September 17, 1968, Affidavit of Mrs. Betty M. Smith In Support of a Temporary Restraining Order filed.

3. September 26, 1968, Joint and Separate Answer of Defendants Joseph L. Donovan and Douglas M. Head and Affidavit of Forrest Talbott (Exhibit to Answer) filed.

4a. September 17, 1968, Opinion of the defendant Attorney General of the State of Minnesota Douglas M. Head to the defendant Secretary of State Joseph L. Donovan stating that 50 U.S.C.A. §841 and §842 (the Communist Control Act of 1954) bars the plaintiffs from appearing on the ballot filed.

4b. September 17, 1968, Written refusal of the defendant Secretary of State Joseph L. Donovan to accept the plaintiffs' nominating petition filed.

5. September 17, 1968, Motion to convene a three-judge court and for a temporary injunction filed.

6. September 19, 1968, Order of Chief Judge Edward J. Devitt convening a three-judge court filed.

7. September 24, 1968 Notice by Chief Judge Edward J. Devitt to the United States Attorney General as required by 28 U.S.C.A. §2403 filed.

8. October 9, 1968, Notice of Trial filed.

9. October 9, 1968, Plaintiffs' notice of motion and motion to amend complaint filed.

10. November 22, 1968, Affidavit of Plaintiff Betty M. Smith in support of plaintiffs' motion to amend complaint filed.

11. November 8, 1968, Defendants' motion to dismiss the action as moot filed.

12. November 8, 1968, Affidavit of Assistant Secretary of State for the State of Minnesota Forrest Talbott in support of defendants' motion to dismiss filed.

13. November 25, 1968, Pages 7 and 8, Transcript of the hearing before Chief Judge Edward J. Devitt on plaintiffs' motion to amend the complaint and the defendants' motion to dismiss as moot heard.
November 25, 1968, Page 12, line 24 through page 15, line 4, Transcript of the hearing before Chief Judge Edward J. Devitt on plaintiffs' motion to amend the complaint and the defendants' motion to dismiss as moot heard.

14. August 12, 1969, Notice of Appeal to the Supreme Court of the United States served.

15. September 22, 1969, Amendments to the Notice of Appeal to the Supreme Court of the United States served.

October 2, 1968, Opinion and Judgment of Three-Judge Court.

July 14, 1969, Opinion and Judgment of Three-Judge Court.

Amended Complaint

[Filed July 14, 1969]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

Parties

I.

Plaintiff Mrs. Charlene Mitchell, a citizen of the United States and the State of New York, is a duly nominated candidate of the Communist Party of the United States for President of the United States; plaintiff Mr. Michael Zagarell, a citizen of the United States and the State of New York, is a duly nominated candidate of the Communist Party for Vice-President of the United States.

II.

The plaintiff Communist Party of the United States, an unincorporated association, is a national political party which has its principal place of business in New York, New York.

III.

Plaintiff Communist Party of the State of Minnesota, an unincorporated association, which has its principal place of business in Minneapolis, Minnesota, is the Minnesota-

Dakotas Division of the Communist Party of the United States, and Mrs. Betty M. Smith is the Secretary of the Communist Party of the State of Minnesota.

IV.

Plaintiffs Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund, and Betty M. Smith, citizens of the United States and the State of Minnesota, eligible voters of the State of Minnesota, are qualified as presidential electors according to Minnesota law, and are duly qualified and approved candidates for the office of presidential elector by the Communist Party of the United States and the Communist Party of Minnesota.

V.

Plaintiff Earl Sorg, a citizen of the United States and a citizen of the State of Minnesota, an eligible voter in the State of Minnesota, and plaintiff Lynn Stein, a citizen of the United States and a citizen of the State of Minnesota, an eligible voter in the State of Minnesota, are signers of a petition to nominate Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund, and Betty M. Smith as candidates for the office of presidential elector.

VI.

Plaintiff Earl Sorg and plaintiff Lynn Stein are members of a class composed of two thousand, three hundred, and ninety-four (2394) eligible voters of the State of Minnesota who have signed the aforesaid petition.

VII.

Plaintiffs Earl Sorg and Lynn Stein bring this action pursuant to Rule 23 Federal Rules of Civil Procedures on behalf of themselves and all persons constituting the above described class who are so similarly situated. The members in the class are so numerous that joinder of all members is impracticable; there are questions of law, of fact common to the class; the claims of the represented parties are typical of the claims of the class; and the represented parties will fairly and adequately protect the interests of the class.

VIII.

Plaintiff Fred Matsch, a citizen of the United States and a citizen of the State of Minnesota, is an eligible voter in the State of Minnesota who did not sign the aforesaid nominating petition.

IX.

Plaintiff Fred Matsch is a member of a class composed of all eligible voters of the State of Minnesota who have not signed the aforesaid nominating petition.

X.

Plaintiff Fred Matsch brings this action pursuant to Rule 23 Federal Rules of Civil Procedure on behalf of himself and all persons constituting the above described class who are so similarly situated. The members in the class are so numerous that joinder of all members is impracticable; there are questions of law, of fact common to the class; the claims of the represented party are typical of the claims of the class; and the represented party will fairly and adequately protect the interests of the class.

XI.

Defendant Joseph L. Donovan is the Secretary of State of the State of Minnesota.

XII.

Defendant Douglas M. Head is the Attorney General for the State of Minnesota.

Jurisdiction

XIII.

Jurisdiction of the parties of this suit is conferred on this Court by 28 United States Code 1331; 28 United States Code 1343 providing for original jurisdiction of this Court in suits authorized by 42 United States Code 1983; 28 United States Code 2201 and 2202 relating to declaratory judgments; 28 United States Code 2282 and 2284 providing for a three-judge District Court wherever application is made for an injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States; 42 United States Code Section 1981, 1983, and 1988; and by the following provisions of the Constitution of the United States:

(a) Article 1 Section 9(3) which provides:

> No Bill of Attainder or ex post facto Law shall be passed.

(b) Article 1 Section 10(1) which provides:

> No State . . . pass any Bill of Attainder, ex post facto law, . . .

(c) Article 2 Section 1(2) which provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

(d) Article 4 Section 2(1) which provides:

> The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

(e) Article 4 Section 4 which provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, . . .

(f) First Amendment to the U.S. Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(g) Fifth Amendment to the U.S. Constitution:

> No person shall . . . be deprived of life, liberty, or property, without due process of law: . . .

(h) Tenth Amendment to the U.S. Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States,

are reserved to the States respectively, or to the people.

(i) Twelfth Amendment to the United States Constitution which provides for the manner of election of the President and Vice-President of the United States.

(j) Fourteenth Amendment to the U.S. Constitution:

. . . No State shall make or enforce any law which shall abridge the privileges or . . .

XVI.

The petition for nomination complied in every respect with the requirements of Section 202.10, Section 202.11, and Section 202.12 Minnesota Statutes (all of which are attached hereto in appendix C).

XVII.

On September 9, 1968, the said nominating petition was duly and properly delivered and tendered to defendant Joseph L. Donovan, Secretary of State, as required by Section 202.13 Minnesota Statutes (attached hereto in appendix C).

XVIII.

Notwithstanding the fact that the aforesaid nominating petition met all the requirements of law, defendant Joseph L. Donovan, on September 9, 1968, wrongfully refused to accept for filing, acknowledge, file and preserve the aforesaid nominating petition subject to public inspection as required by Section 202.13 Minnesota Statutes. Defendant

Joseph L. Donovan's wrongful refusal was based upon an opinion issued to him on September 9, 1968 by defendant Douglas M. Head, Attorney General of Minnesota (a full copy of which is attached hereto as appendix E) which states that defendant Donovan "should refuse to accept for filing the nominating petition in question" because of the provisions of the Communist Control Act of 1954, 50 U.S. Code Section 841 and Section 842 (1954) which provides in part as follows:

> Your attention is directed to the Communist Control Act, 50 U.S.C. § 841 (1954) which provides, in part, as follows:
>
> > The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States . . . . Therefore, the Communist Party should be outlawed.
>
> Section 842 of the Communist Control Act declares that:
>
> > The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever

> rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated . . . .

Defendant Joseph L. Donovan's written refusal to accept the petition is attached hereto as appendix D.

XIX.

Because of the acts of the defendants as alleged herein, plaintiffs Charlene Mitchell and Michael Zagarell, candidates of the Communist Party of the United States for President and Vice-President of the United States will not appear upon the ballot in the State of Minnesota in the forthcoming General Election to be held on November 5, 1968 unless relief is granted as hereinafter prayed for.

XX.

Because of the illegal actions of the defendants as alleged herein, plaintiff Communist Party of the United States, plaintiff Charlene Mitchell, and plaintiff Michael Zagarell will be illegally excluded from a place on a ballot in the November 5 Minnesota General Election in violation of the prohibition against bills of attainders, in violation of Article 2 Section 1 (2) and the First, Fifth, Tenth, Twelfth Amendments, and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

XXI.

Because of the illegal acts of the defendant as alleged herein, plaintiffs Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund, and Betty M. Smith will be precluded from running for the office of presidential elector.

XXII.

Because of the illegal actions of the defendants as alleged herein, plaintiffs Earl Sorg, Lynn Stein, Fred Matsch, and the classes they represent, will be disenfranchised and deprived of their fundamental constitutional rights in the following respects:

(a) By denying them the right to vote for candidates of their choice for President and Vice-President of the United States in violation of Article 2 Section 1 Clause 2 of the United States Constitution.

(b) By denying them the privilege and immunity guaranteed citizens in the several states, contrary to Article 4 Section 2 of the United States Constitution.

(c) By violating the guarantee of the republican form of government, contrary to Article 4 Section 4 of the United States Constitution.

(d) By denying them a voice and vote by excluding them from the electoral process, contrary to the First Amendment to the United States Constitution.

(e) By denying them the equal protection of the laws and due process of law contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

XXIII.

The illegal actions of the defendants as alleged herein are based upon the misconstruction and misapplication of the Communist Control Act of 1954 which, as properly construed and applied, does not deprive plaintiff Communist Party of the United States and its candidates of the right to appear on the ballot in the State of Minnesota, nor does it deprive plaintiffs Earl Sorg, Lynn Stein, and Fred Matsch the right to vote for candidates of their choice.

XXIV.

The Communist Control Act of 1954 on its face and as construed and applied by the defendants, violates the following provisions of the United States Constitution:

(a) Article 1 Section 9 Clause 3

(b) Article 2 Section 1 Clause 2

(c) Article 4 Section 2 Clause 1 and Section 4 and the

(d) First, Fifth, Tenth, and Twelfth Amendments

XXV.

The plaintiff Communist Party of the United States and the plaintiff Communist Party of the State of Minnesota plan to participate in Minnesota local, state, and national elections subsequent to the November 5 Minnesota General Election.

XXVI.

By information and belief it appears that the defendant Attorney General Douglas M. Head will give the opinion to any election official in the State of Minnesota that the Communist Control Act of 1954 bars the plaintiff Communist Party of the United States, the plaintiff Communist Party of Minnesota or any candidates running under their endorsement from participating in any local, state, or national election in the State of Minnesota.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and those similarly situated:

1. That the Court convene a statutory three-judge Court pursuant to 28 United States Code-Section 2282 and Section 2284;

2. That the Court issue a temporary restraining order and permanent injunction requiring defendant Secretary of State Joseph L. Donovan to accept and file the aforesaid petition for nomination as required by Section 202.13 Minnesota Statutes, and require that defendant Donovan include upon the ballot for the General Election to be held on November 5, 1968, the names of Charlene Mitchell and Michael Zagarell as candidates of the Communist Party of the United States for President and Vice-President of the United States, as required by Section 208.04 Minnesota Statutes;

3. That the Court declare that the Communist Control Act of 1954, on its face or as applied in this case, violates Article 1 Section 9 Clause 3, Article 2 Section 1 Clause 2,

Article 4 Section 2 Clause 1 and Section 4, and the First, Fifth, Tenth, and Twelfth Amendments to the United States Constitution;

4. That the Court declare that the acts of the defendants herein complained of are wrongful and in violation of the following provisions of the United States Constitution: Article 1 Section 9 Clause 3 and Section 10 Clause 1; Article 2 Section 1 Clause 2; Article 4 Section 2 Clause 1 and Section 4; and the First, Fifth, Tenth, Twelfth, and Fourteenth Amendments; and

5. For such other and all relief that the Court may determine equitable and proper.

Dated September 11, 1968; paragraphs XXV and XXVI, amendments, allowed by the Court, July 14, 1969.

MINNESOTA CIVIL LIBERTIES UNION

By LYNN S. CASTNER
Attorney for Plaintiffs
925 Upper Midwest Building
Minneapolis, Minnesota 55401
333-2534

Of Counsel:

MELVIN L. WULF
Legal Direction
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Affidavit of Lynn S. Castner

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. LYNN S. CASTNER, being first duly sworn, deposes and says:

That he is attorney for the plaintiffs herein.

That at or about 1:30 p.m. on September 9, 1968 your affiant, accompanied by plaintiff Betty M. Smith and Miss Mary Lou Patterson, New York City representative of the Mitchell-Zagarell campaign committee and Mr. Michael Eisenscher, Milwaukee staff representative of the Mitchell-Zagarell campaign committee, went to the office of Joseph L. Donovan, Secretary of State of the State of Minnesota to present a nominating petition containing two thousand, three hundred, and ninety-four (2394) signatures to place on the Minnesota General Election ballot on November 5, 1968 Elmer Borman, Rose E. Bruns, Obadiah Cummins, James Erickson, Nels Gudbrandson, Vernon Hartwig, Clara Jorgenson, Trygve Larsen, Carl Lund and Betty M. Smith as presidential electors.

That your affiant introduced plaintiff Betty M. Smith and her associates to Secretary of State Donovan, and explained that your affiant was present to witness the filing of the said nominating petition.

Plaintiff Smith handed the said nominating petition to the Secretary of State Joseph Donovan who told your affiant he refused to accept said nominating petition and handed your affiant a written notice which reads:

September 9, 1968

TO ANY AND ALL PERSONS PRESENTING A NOMINATING PETITION OF THE COMMUNIST PARTY FOR FILING WITH THE SECRETARY OF STATE OF MINNESOTA FOR THE PURPOSE OF NOMINATING PRESIDENTIAL ELECTORS FOR THE GENERAL ELECTION OF 1968:

Please be advised that upon the advice of the Attorney General of Minnesota and at his direction as a matter of law, I hereby officially refuse and reject said petition.

JOSEPH L. DONOVAN
Secretary of State

Secretary of State also handed your affiant a copy of an opinion of Attorney General of the State of Minnesota Douglas M. Head which reads:

September 9, 1968

You have requested our opinion as to whether you should accept for filing a nominating petition for presidential electors submitted pursuant to M.S. 1967 § 202.10 on behalf of the Communist Party of the United States.

Your attention is directed to The Communist Control Act, 50 U.S.C. § 841 (1964) which provides, in part, as follows:

> "The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. . . . Therefore, the Communist Party should be outlawed."

Section 842 of the Communist Control Act declares that:

> "The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose subject or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated. . . . "

In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings.

Your affiant requested Secretary of State Donovan to physically examine said nominating petition. Secretary of State Donovan did open a manila envelope which your affiant handed to him, and thumbed through a number of pages and stated that it appeared to be a petition of the Communist Party of the United States to place their ticket on the Minnesota General Election ballot of November 5, 1968.

Secretary of State Donovan informed your affiant that he could not accept said nominating petition and handed it to your affiant. Your affiant took said nominating petition and presented it to Assistant Secretary of State Forrest Talbott who sealed said petition with gummed tape in a manila envelope, and upon the envelope wrote the words, "Sealed after identification Sept. 9, 1968 as Communist Party petition to nominate presidential electors presented to Secretary of State of Minnesota and by him refused Sept. 9, 1968. Forrest Talbott, Asst. Sec. of State"

Dated September 11, 1968.

LYNN S. CASTNER

[Subscription omitted in printing.]

Affidavit of Betty M. Smith

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. BETTY M. SMITH, being first duly sworn, deposes and says:

That she is 41 years of age, she resides at 4302 Fifth Avenue South, Minneapolis, Minnesota and she is an eligible voter in the State of Minnesota.

That your affiant holds the office of Secretary of the Communist Party of Minnesota, an unincorporated association whose principal place of business is in Minneapolis, Minnesota, and which is the Minnesota-Dakotas District of the Communist Party of the United States, an unincorporated association whose principal place of business is in New York, New York.

That your affiant has occupied the position of Secretary of the Communist Party of Minnesota since 1965.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters in Minnesota as a nominated candidate for the

office of presidential elector, and she was duly qualified as a presidential elector candidate, together with the other nine (9) plaintiff presidential elector candidates, by the Communist Party of Minnesota.

That your affiant, in her official capacity as Secretary of the Communist Party of Minnesota, did attend a duly convened convention of the Communist Party of Minnesota on or about June 23, 1968 in the State of Minnesota.

That your affiant was a participant in this convention which duly elected six (6) delegates and an alternate delegate to the national convention of the Communist Party of the United States held in New York on or about July 4-7, 1968.

That at the convention of the Communist Party of Minnesota a motion was passed that if the national Communist Party convention nominated a presidential ticket, that the Communist Party of Minnesota would endeavor to place the candidates on the ballot of the General Election in Minnesota, November 5, 1968.

That your affiant was an elected delegate, and did attend the national convention of the Communist Party of the United States.

That at the national convention, on or about July 7, 1968, Mrs. Charlene Mitchell was duly nominated as a Communist Party of the United States candidate for the office of president of the United States, and that Mr. Michael Zagarell was duly nominated as a Communist Party of the United States candidate for the office of vice-president of the United States.

That without delay the Communist Party of Minnesota obtained the required ten (10) candidates for the office of presidential elector, and duly qualified those ten (10) presidential elector candidates.

That on or about Sunday, September 8, 1968, your affiant had assembled the nominating petitions containing two thousand, three hundred and ninety-four (2394) signatures.

That on Monday, September 9, 1968, your affiant, accompanied by Miss Mary Lou Patterson, New York City representative of the Mitchell-Zagarell Campaign Committee and Mr. Michael Eisenscher, Milwaukee staff representative of the Mitchell-Zagarell Campaign Committee, went to the office of Joseph L. Donovan, Secretary of State of the State of Minnesota to present the nominating petition.

That your affiant and her associates appeared at the office of the Secretary of State during the noon hour, and was informed by an office employee that if the petitions were presented that they would be refused.

That your affiant called Lynn S. Castner, Executive Director, Counsel of the Minnesota Civil Liberties Union and requested legal assistance in placing the names of the plaintiff petition candidates on the ballot.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union in this matter.

That at or about 1:30 p.m. on September 9, 1968 your affiant and her attorney, Lynn S. Castner, presented the nominating petitions to Secretary of State who refused to accept the nominating petitions, but that he did open the package and examine the contents of the petitions before refusing the same.

That the Secretary of State handed to your affiant and her attorney his written refusal to accept the petitions together with a copy of an opinion by Douglas M. Head, Attorney General of the State of Minnesota that 50 U.S.C.A.

841, 842 prohibit the Secretary of State from placing the plaintiff candidates on the Minnesota General Election ballot.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, as an eligible voter in the State of Minnesota, is denied the right to have the choice of voting for presidential candidate plaintiff Mrs. Charlene Mitchell and vice-presidential candidate plaintiff Mr. Michael Zagarell.

That your affiant, individually, and on behalf of the Communist Party of Minnesota retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent the plaintiff parties in this action for declaratory and injunctive relief.

Dated September 11, 1968.

MRS. BETTY M. SMITH

[Subscription omitted in printing.]

Affidavit of Michael Zagarell

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. MICHAEL ZAGARELL, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant resides at 390 First Street, Brooklyn, New York.

That your affiant is a candidate for the office of vice-president of the United States on the ticket of the Communist Party of the United States.

That on or about July 7, 1968, your affiant was nominated as the candidate for the office of vice-president of the United States, by the national convention of the Communist Party of the United States, assembled in New York, New York, to run in the 1968 United States presidential election to be held on November 5, 1968.

That your affiant was present at said convention, and participated in said convention when plaintiff Charlene

Mitchell was nominated as the candidate for the office of president of the United States on the ticket of the Communist Party of the United States.

By the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, signed by two thousand, three hundred and ninety-four (2394) eligible voters in the State of Minnesota, your affiant and plaintiff Charlene Mitchell are denied the right to appear as candidates for the office of president and vice-president of the United States on the November 5, 1968 election ballot of the State of Minnesota.

That your affiant, individually, and on behalf of the Communist Party of the United States retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent the plaintiff parties in this action for declaratory and injunctive relief.

Dated September 10, 1968.

MICHAEL ZAGARELL

[Subscription omitted in printing.]

Affidavit of James Erickson

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. JAMES ERICKSON, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 43 years of age and resides at 510 South Eighth Street, Minneapolis, Minnesota.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters of the State of Minnesota as a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant was duly qualified and approved by the Communist Party of Minnesota to be a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of

Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant has retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent him in this action for declaratory and injunctive relief.

Dated September 10, 1968.

JAMES ERICKSON

[Subscription omitted in printing.]

Affidavit of Elmer Borman

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. ELMER BORMAN, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 82 years of age and resides at 122 West Grant, Apartment #4, Minneapolis, Minnesota.

That your affiant was nominated by a petition signed by two thousand three hundred and ninety-four (2394) eligible voters of the State of Minnesota as a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant was duly qualified and approved by the Communist Party of Minnesota to be a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota,

and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant has retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent him in this action for declaratory and injunctive relief.

Dated September 10, 1968.

ELMER J. BORMAN

[Subscription omitted in printing.]

Affidavit of Trygve Larsen

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. TRYGVE LARSEN, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 74 years of age and resides at 630 Bryant Avenue North, Minneapolis, Minnesota.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters of the State of Minnesota as a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant was duly qualified and approved by the Communist Party of Minnesota to be a candidate for the office of presidential elector to support the Mitchell-Zagarell ticket.

That your affiant, because of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota,

and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the opportunity to run for the office of presidential elector on the ballot of the State of Minnesota in the General Election of November 5, 1968.

That your affiant has retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent him in this action for declaratory and injunctive relief.

Dated September 10, 1968.

TRYGVE LARSEN

[Subscription omitted in printing.]

Affidavit of Earl Sorg

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. EARL SORG, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 52 years of age and resides at Route #2, Hastings, Minnesota.

That your affiant, on or about Tuesday, August 27, 1968 signed his name on a nominating petition for Communist Party of United States candidates for president and vice-president, to place the names of plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell on the ballot of the State of Minnesota as provided for by Minnesota law.

That your affiant is an eligible voter in the State of Minnesota. That your affiant, by reason of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition,

is denied the right to have the choice of voting for plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell.

That your affiant wrote his post office address following his signature on the petition and that your affiant subscribed to the following oath, "I solemnly swear or (affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for the office for which this nominating petition is made, and that I signed the same of my own free will," as provided by M.S. 202.12.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent me as a plaintiff in the above captioned action.

Dated September 10, 1968.

EARL SORG

[Subscription omitted in printing.]

Affidavit of Mrs. Lynn Stein

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. LYNN STEIN, being first duly sworn, deposes and says:

That she is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 36 years of age and resides at 68 Barton Avenue Southeast, Minneapolis, Minnesota.

That your affiant, on or about Tuesday, August 27, 1968, signed her name on a nominating petition for the Communist Party of the United States candidates for president and vice-president, to place the names of plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell on the ballot of the State of Minnesota, as provided for by Minnesota law, at the General Election November 5, 1968.

That your affiant is an eligible voter of the State of Minnesota. That your affiant, by reason of the action of Joseph L. Donovan, Secretary of State of the State of

Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the right to have the choice of voting for plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell.

That your affiant wrote her post office address following her signature on the petition and that your affiant subscribed to the following oath, "I solemnly swear (or affirm) that I know the contents and purpose of this petition, that I do not intend to vote at the primary election for the office for which this nominating petition is made, and that I signed the same of my own free will," as provided by M.S. 202.12.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent me as a plaintiff in the above captioned action.

Dated September 10, 1968.

LYNN STEIN

[Subscription omitted in printing.]

Affidavit of Fred Matsch

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MR. FRED MATSCH, being first duly sworn, deposes and says:

That he is one of the parties in the above captioned action which is one for declaratory and injunctive relief.

That your affiant is 22 years of age and resides at 1511 King Midas Lane, Hastings, Minnesota.

That your affiant is not a signer of the nominating petition for the Mitchell-Zagarell presidential and vice-presidential ticket.

That your affiant is an eligible voter of the State of Minnesota. That your affiant, by reason of the action of Joseph L. Donovan, Secretary of State of the State of Minnesota, and Douglas M. Head, Attorney General of the State of Minnesota, in refusing to accept the nominating petition, is denied the right to have the choice of voting for

plaintiff presidential candidate Mrs. Charlene Mitchell and plaintiff vice-presidential candidate Mr. Michael Zagarell.

That your affiant retained the services of volunteer attorneys of the Minnesota Civil Liberties Union to represent me as a plaintiff in the above captioned action.

Dated September 10, 1968.

FREDERICK L. MATSCH

[Subscription omitted in printing.]

Affidavit of Mrs. Betty M. Smith in Support of a Temporary Restraining Order

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. BETTY M. SMITH, being first duly sworn, deposes and says:

That she is 41 years of age, she resides at 4302 Fifth Avenue South, Minneapolis, Minnesota, and she is an eligible voter in the State of Minnesota.

That your affiant holds the office of Secretary of the Communist Party of Minnesota, an unincorporated association whose principal place of business is in Minneapolis, Minnesota, and which is the Minnesota-Dakotas District of the Communist Party of the United States, an unincorporated association whose principal place of business is in New York, New York.

That your affiant has occupied the position of Secretary of the Communist Party of Minnesota since 1965.

That your affiant, in her official capacity as Secretary of the Communist Party of Minnesota, did attend a duly con-

vened convention of the Communist Party of Minnesota on or about June 23, 1968 in the State of Minnesota.

That your affiant was a participant in this convention which duly elected six (6) delegates and an alternate delegate to the national convention of the Communist Party of the United States held in New York on or about July 4-7, 1968.

That at the convention of the Communist Party of Minnesota a motion was passed that if the national Communist Party convention nominated a presidential ticket, that the Communist Party of Minnesota would endeavor to place the candidates on the ballot of the General Election in Minnesota, November 5, 1968.

That your affiant was an elected delegate, and did attend the national convention of the Communist Party of the United States.

That your affiant, for and on behalf of the Communist Party of the State of Minnesota, and in cooperation with the Communist Party of the United States and the staff of the Mitchell-Zagarell campaign committee, planned a tightly scheduled campaign program for candidates Mitchell and Zagarell in the State of Minnesota.

That there is less than two months time remaining of campaign time prior to the November 5, 1968 Minnesota General Election.

That your affiant believes that the Secretary of State of the State of Minnesota plans to order the ballots printed on October 7, 1968.

That if candidates Mitchell and Zagarell are not qualified to appear on the ballot, before October 7, 1968, by reason of the Secretary of State's refusal to accept the nominat-

ing petition, the Mitchell-Zagarell campaign plans will be necessarily suspended for over half of the campaign time remaining.

Dated September 11, 1968.

MRS. BETTY M. SMITH

[Subscription omitted in printing.]

Joint and Separate Answer of Defendants Joseph L. Donovan and Douglas M. Head and Affidavit of Forrest Talbott.

[Filed September 26, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

FIRST DEFENSE

1. The complaint fails to state a claim against defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

2. The Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

3. Admit the allegations contained in paragraphs XI and XII of said complaint;

4. With respect to paragraph XVII, admit that a purported nominating petition was presented to defendant Secretary of State on September 9, 1968;

5. Admit the allegations contained in paragraph XVIII of said complaint, except insofar as said paragraph alleges that the defendant Donovan "wrongfully" refused to accept

said petition and except insofar as said paragraph alleges that said petition met all the requirements of law;

6. Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs I, III, IV, V, VI, VII, VIII, IX, X, XIV, XV, XVI of said complaint;

7. Deny the allegations of paragraph II of said complaint and allege with respect thereto that the Communist Party of the United States is not a national political party; that the Congress of the United States has determined and declared, Title 50, sections 841 and 842, United States Code, as follows:

"§ 841. Findings and declarations of fact

The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to

party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed. Aug. 24, 1954, c. 886, §2, 68 Stat. 775.

§ 842. Proscription of Communist Party, its successors, and subsidiary organizations

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the

Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended. Aug. 24, 1954, c. 886, § 3, 68 Stat. 776."

8. With respect to paragraphs XIX and XX of said complaint, admit that plaintiffs Communist Party of the United States, Mitchell and Zagarell, will not appear upon the ballot in the State of Minnesota in the forthcoming General Election; deny that said non-appearance on the ballot resulted from any illegal acts of defendants; and allege that the Communist Control Act of 1954, set forth in paragraph 7 of this Answer, prohibits the appearance of said plaintiffs on said ballot.

9. Deny each and every other allegation contained in said complaint.

WHEREFORE, defendants pray that said complaint be dismissed with prejudice and that they be awarded their costs and disbursements herein.

DOUGLAS M. HEAD
Attorney General

RICHARD H. KYLE
Solicitor General

DAVID J. BYRON
Special Assistant
Attorney General

By RICHARD H. KYLE
Attorneys for Defendants
160 State Office Building
St. Paul, Minnesota 55101
221-2961

Affidavit of Forrest Talbott

STATE OF MINNESOTA,
COUNTY OF RAMSEY, *ss.*:

FORREST TALBOTT being first duly sworn, deposes and says:

1. He is the Assistant Secretary of State for the State of Minnesota;

2. Pursuant to the direction of the Secretary of State, he is responsible for administration of the preparation of ballots for the general election to be held on November 5, 1968;

3. Approximately 1,700,000 paper ballots will be printed at an estimated cost of $7,000 to $8,000;

4. Approximately 10,000 paper ballots will be mailed to absentee voters, including approximately 5,000 to Minnesota residents presently in Vietnam;

5. Military authorities have informed your affiant that absentee ballots mailed to Vietnam must be mailed from the 87 county auditors no later than October 15, 1968;

6. Target date for actual receipt by the county auditors of state and presidential ballots is Monday, October 14, 1968;

7. A minimum of four 24-hour work days are required to accomplish the printing, assembling and distribution of ballots;

8. The time limit set by statute for withdrawal from the general ballot is 5:00 p.m., October 7, 1968;

9. The Secretary of State has determined that the anticipated large number of absentee voters in the general election favors that the printing of ballots commence at the close of business on Friday, October 4, 1968;

10. The presidential ballot is printed with the state ballot (M.S.A. §208.04) and a sample thereof is required to be filed in the office of Secretary of State "four weeks before the general election" for public inspection (M.S.A. §203.28, Subd. 3), and three weeks before such elections sample copies of the state ballots are required to be mailed to the auditor of each county;

11. "*At least* 15 days before the general election", the state ballots are required to be mailed to the auditor of each county. (M.S.A. §203.28, Subd. 3).

Further affiant sayeth not.

FORREST TALBOTT

[Subscription omitted in printing.]

Opinion of the Defendant Attorney General of the State of Minnesota Douglas M. Head to the Defendant Secretary of State Joseph L. Donovan Stating That 50 U.S.C.A. 841 and 842 (Communist Control Act of 1954) Bars the Plaintiffs From Appearing on the Ballot

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

September 9, 1968

You have requested our opinion as to whether you should accept for filing a nominating petition for presidential electors submitted pursuant to M.S. 1967 § 202.10 on behalf of the Communist Party of th. United States.

Your attention is directed to The Communist Control Act, 50 U.S.C. § 841 (1954) which provides, in part, as follows:

> "The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the government of the United States. . . . Therefore, the Communist Party should be outlawed."

Section 842 of the Communist Control Act declares that:

> "The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the government of the United States, or the government of any state, territory, district, or possession thereof, or the government of any political subdivision therein, by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or to any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are terminated. . . ."

In view of the above federal statutes, we are of the opinion that you should refuse to accept for filing the nominating petition in question. However, any doubts relative to this matter can only be finally resolved by the courts pursuant to appropriate legal proceedings.

DMH:im

DOUGLAS M. HEAD
Attorney General
State of Minnesota

Written Refusal of the Defendant Secretary of State Joseph L. Donovan to Accept the Plaintiffs' Nominating Petition

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

September 9, 1968

TO ANY AND ALL PERSONS PRESENTING A NOMINATING PETITION OF THE COMMUNIST PARTY FOR FILING WITH THE SECRETARY OF STATE OF MINNESOTA FOR THE PURPOSE OF NOMINATING PRESIDENTIAL ELECTORS FOR THE GENERAL ELECTION OF 1968:

Please be advised that upon the advice of the Attorney General of Minnesota and at his direction as a matter of law, I hereby officially refuse and reject said petition.

JOSEPH L. DONOVAN
Secretary of State

Motion to Convene a Three-Judge Court

[Filed September 17, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

COMES NOW THE PLAINTIFFS, by their attorney, and move the Court for an order in the above-captioned cause convening a three-judge District Court pursuant to 28 U. S. C. A. 2282, 2284 because this action seeks an injunction to restrain the enforcement, operation or execution of an Act of Congress (50 U.S.C.A. 841 and 842) for repugnance to the Constitution of the United States.

The plaintiffs also move the Court for a temporary mandatory injunction requiring the Defendant Joseph L. Donovan to accept for filing the nominating petition of the Communist Party of the United States of America (Exhibit B in this action) and to file and acknowledge said petition, pursuant to M.S.A. 202.13 as of the date that it was duly tendered and refused, September 9, 1968.

Unless the Court orders the defendant Secretary of State Donovan to file the said nominating petition, the plaintiffs will suffer irreparable injury, loss and damage by reasons set forth in the affidavits herein, and the plaintiffs have no other adequate remedy at law.

If this temporary mandatory injunction be granted, the defendant Secretary of State Donovan and the State of Minnesota will suffer no injury.

Dated this 17th day September, 1968.

LYNN S. CASTNER
Attorney for Plaintiffs
Minnesota Civil Liberties Union
925 Upper Midwest Building
Minneapolis, Minnesota 55401
Phone ac 612, 333-2534

Of Counsel:

MELVIN WULF
Legal Director
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Order of Chief Judge Edward J. Devitt Convening a Three-Judge Court

[Filed September 19, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

You are hereby notified that in the above entitled cause on the 19th day of September, 1968, Designation of Circuit Judge Harry A. Blackmun, Chief District Judge Edward J. Devitt and District Judge Philip Neville to serve as members of a Three-Judge District Court (dated Sept. 16, 1968 signed by Chief Judge of the Eighth Circuit Martin D. VanOosterhout) was filed.

FRANK A. MASSEY
Clerk

By MARION G. HILGERT
Deputy Clerk

To:

MR. LYNN S. CASTNER
Minnesota Civil Liberties Union
925 Upper Midwest Bldg.
Minneapolis, Minnesota 55401
Attorney for plaintiffs

MR. RICHARD KYLE
Solicitor General
160 State Office Bldg.
St. Paul, Minnesota 55101

Note: If an appeal is contemplated, the Rules of the United States Court of Appeals and "Suggestions to Attorneys Concerning Appellate Rules & Practice" can be procured from the Clerk, United States Court of Appeals, U. S. Court House and Customs House, St. Louis, Missouri.

Notice by Chief Judge Edward J. Devitt to the United States Attorney General as Required by U.S.C.A. §2403

[Filed September 24, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

You are hereby notified that in the above entitled cause on the 24th day of September, 1968, we filed the Court's certificate advising the U. S. Attorney General as to the constitutionality of an act of Congress affecting the public interest being drawn in question, and also notice of hearing for temporary injunction, copies of which are herewith enclosed.

FRANK A. MASSEY
Clerk

By LAWRENCE R. TAPPER
Deputy Clerk

To:

LYNN S. CASTNER
Minnesota Civil Liberties Union
925 Upper Midwest Bldg.
Mpls., Minn. 55401
Attorney for plaintiffs

MELVIN L. WULF, Legal Director
American Civil Liberties Union
156 5th Ave.
New York, N. Y. 10010
Attorney for plaintiffs

DOUGLAS HEAD, Attorney General
RICHARD KYLE, Asst. Atty. Gen.
State Capitol—160 State Office Bldg.
St. Paul, Minn. 55101
Attorney for defendants

ATTORNEY GENERAL OF THE UNITED STATES
Washington, D. C.
Attorney for the U. S.

PATRICK J. FOLEY, U. S. Attorney
596 U. S. Courthouse—110 S. 4th St.
Minneapolis, Minn.
Attorney for the U. S.

Note: If an appeal is contemplated, the Rules of the United States Court of Appeals and "Suggestions to Attorneys Concerning Appellate Rules & Practice" can be procured from the Clerk, United States Court of Appeals, U. S. Court House and Customs House, St. Louis, Missouri.

Letter Directing Appearance in Court

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

OFFICE OF THE CLERK

ST. PAUL 55101

FRANK A. MASSEY, CLERK

September 12, 1968

Attorney General of the United States
Washington, D. C.

In re: Charlene Mitchell, et al. vs. Joseph L. Donovan, etc., et al. 3-68 Civil 256

Dear Sir:

Please find enclosed herewith a copy of order filed this date directing that you appear in this Court 9-17-68 at ten o'clock a. m. to advise the Court as to your official view of the constitutionality of the Communist Control Act of 1954, as it pertains to the issues involved in the above-described action.

We advised you of this order by teletype this afternoon.

Sincerely,

/s/ LAWRENCE R. TAPPER
Lawrence R. Tapper,
Deputy Clerk.

cc: Lynn S. Castner
Patrick J. Foley, U. S. Attorney
Attorney General, State of Minn.

Plaintiffs' Notice of Motion and Motion to Amend Complaint

[Filed October 9, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

Comes now the plaintiffs, by their attorney, and move the Court for an order in the above-captioned cause to allow amendment of the complaint by adding the following language after paragraph XXIV and before the Prayer for Relief:

XXV.

The plaintiff Communist Party of the United States and the plaintiff Communist Party of the State of Minnesota plan to participate in Minnesota local, state, and national elections subsequent to the November 5 Minnesota General Election.

XXVI.

By information and belief it appears that the defendant Attorney General Douglas M. Head will give the opinion to any election official in the State of Minnesota that the Communist Control Act of 1954 bars the plaintiff Communist Party of the United States, the plaintiff Communist Party of Minnesota or any candidates running under their

endorsement from participating in any local, state, or national election in the State of Minnesota.

Dated this 9th day of October, 1968.

LYNN S. CASTNER
Attorney for Plaintiffs
Minnesota Civil Liberties Union
925 Upper Midwest Building
Minneapolis, Minnesota 55401
Phone ac 612, 333-2534

Of Counsel:

MELVIN WULF
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

Affidavit of Plaintiff Betty M. Smith in Support of Plaintiffs' Motion to Amend Complaint

[Filed November 22, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF HENNEPIN, *ss.*:

MRS. BETTY M. SMITH, being first duly sworn, deposes and says:

That she is 41 years of age, she resides at 4302 Fifth Avenue South, Minneapolis, Minnesota and she is an eligible voter in the State of Minnesota.

That your affiant has occupied the position of Secretary of the Communist Party of Minnesota since 1965.

That your affiant was nominated by a petition signed by two thousand, three hundred and ninety-four (2394) eligible voters in Minnesota as a nominated candidate for the office of presidential elector, and she was duly qualified as a presidential elector candidate, together with the other nine (9) plaintiff presidential elector candidates, by the Communist Party of Minnesota.

That the Communist Party of Minnesota, in cooperation with the Communist Party, U.S.A., duly qualified by peti-

tion ten (10) presidential elector candidates in support of the Communist Party, U.S.A. presidential ticket Charlene Mitchell and Michael Zagarell which appeared on the Minnesota General Election ballot November 5, 1968.

That this Court, by a temporary restraining order dated October 2, 1968, ordered the defendant Joseph L. Donovan, as Secretary of State of Minnesota, to accept for filing the nominating petition of the plaintiffs.

That the defendant Joseph L. Donovan did accept for filing on or about October 2, 1968 the petition of the plaintiffs and that the Communist Party, U.S.A. presidential ticket did appear on the Minnesota General Election ballot November 5, 1968.

That the Communist Party of Minnesota participated in a number of state and local elections until and including the year 1949.

That in the 1950's and early 1960's the Communist Party of Minnesota did not participate in state and local elections because of the repressive political climate.

That the Communist Party of Minnesota discussed participation of the Communist Party candidates in state and local elections in 1964 and 1966, which participation did occur in some areas of the country.

That your affiant, in her official capacity as Secretary of the Communist Party of Minnesota, did attend a duly convened convention of the Communist Party of Minnesota on or about June 23, 1968 in the State of Minnesota.

That the Communist Party of Minnesota elected your affiant as a delegate to the national convention of the Communist Party, U.S.A. and your affiant did attend a national convention of the Communist Party, U.S.A. on or about July 4-7, 1968.

That following the national convention of the Communist Party, U.S.A. which endorsed the Mitchell-Zagarell presidential ticket, the Communist Party of Minnesota did campaign and participate in the 1968 national elections in Minnesota.

That your affiant, as Secretary of the Communist Party of Minnesota, states that the Communist Party of Minnesota will continue to participate in national, state, and local elections in the State of Minnesota.

Dated November 22, 1968.

BETTY M. SMITH

[Subscription omitted in printing.]

Defendants' Motion to Dismiss the Action as Moot

[Filed November 8, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

To: THE PLAINTIFFS, ABOVE NAMED and to LYNN S. CASTNER, THEIR ATTORNEY,

RAMSEY CLARK, JR., Attorney General of the United States,

PATRICK J. FOLEY, United States Attorney for the District of Minnesota.

PLEASE TAKE NOTICE: That at a Special Term of the above-named Court to be held in the United States District Court in the City of Saint Paul, Minnesota on the 25th day of November, 1968, at 10:00 in the forenoon, or as soon thereafter as counsel can be heard, defendants, by their attorney, the Attorney General of the State of Minnesota, will move the Court for an Order:

Dismissing the above entitled action upon the ground and for the reason that the issues involved in this litigation have become moot and that there is no longer any justiciable issue to be tried before this Court.

Said motion will be made and based upon all the files, records and proceedings herein and upon the affidavit hereto attached.

DOUGLAS M. HEAD
Attorney General

RICHARD H. KYLE
Solicitor General

DAVID J. BYRON
Special Assistant
Attorney General

By RICHARD H. KYLE
Attorneys for Defendants,
160 State Office Building
St. Paul, Minnesota 55101

Affidavit of Assistant Secretary of State for the State of Minnesota Forrest Talbott in Support of Defendants' Motion to Dismiss

[Filed November 8, 1968]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

STATE OF MINNESOTA,
COUNTY OF RAMSEY, *ss.*:

FORREST TALBOTT being first duly sworn deposes and says:

1. He is the Assistant Secretary of State for the State of Minnesota;

2. Pursuant to the order of this Court dated October 2, 1968, Joseph L. Donovan, as Secretary of State of Minnesota, did accept for filing the nominating petition of the plaintiffs in this action, and he further caused the names of the plaintiffs, Charlene Mitchell and Michael Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States, to be placed on the ballot for the November 5, 1968, general election;

3. A sample copy of the general election ballot prepared for the November 5, 1968, general election, is attached hereto as Exhibit A.

4. Said general election was held on November 5, 1968, and said general election ballot was used therein;

5. The next statewide general election for which the Secretary of State is charged with the preparation of ballots will be held in November, 1970.

Further affiant sayeth not.

FORREST TALBOTT

[Subscription omitted in printing.]

EXHIBIT "A" ANNEXED TO AFFIDAVIT OF FORREST TALBOTT

SAMPLE BALLOT

FOR

GENERAL ELECTION

November 5, 1968

Joseph L. Donovan

Secretary of State

		Put an (x) opposite the name of the Presidential Candidate you wish to vote for, in the box indicated by the arrow.
		PRESIDENTIAL BALLOT MARK YOUR (X) IN ONE BOX ONLY
		NIXON AND AGNEW — Republican
		HUMPHREY AND MUSKIE — Democratic-Farmer-Labor
		WALLACE AND GRIFFIN — American Party Nominated by Petition
		HALSTEAD AND BOUTELLE — Socialist Workers Party Nominated by Petition
		BLOMEN AND TAYLOR — Industrial Government Party Nominated by Petition
		MITCHELL AND ZAGARELL — Communist Party USA Nominated by Petition
		CLEAVER AND TERRY — Peace and Freedom Party Nominated by Petition

Put an (x) opposite the name of each candidate you wish to vote for, in the square indicated by the arrow.

STATE BALLOT

FOR REPRESENTATIVE IN CONGRESS
FIFTH DISTRICT
VOTE FOR ONE

	HARMON T. OGDAHL — Republican
	DONALD M. FRASER — Democratic-Farmer-Labor
	WILLIAM C. BRAATZ — Industrial Government Party Nominated by Petition
	DAVID THORSTAD — Socialist Workers Party Nominated by Petition

FOR PUBLIC SERVICE COMMISSIONER
VOTE FOR ONE

	LYLE D. NELSON — Republican
	PAUL A. RASMUSSEN — Democratic-Farmer-Labor

FOR ASSOCIATE JUSTICE OF SUPREME COURT

FOR THE OFFICE OF ASSOCIATE JUSTICE OF SUPREME COURT TO WHICH WILLIAM P. MURPHY WAS ELECTED FOR THE REGULAR TERM
VOTE FOR ONE

	WILLIAM P. MURPHY — Incumbent Nominated Without Party Designation

FOR THE OFFICE OF ASSOCIATE JUSTICE OF SUPREME COURT TO WHICH [illegible] WAS ELECTED FOR THE REGULAR TERM
VOTE FOR ONE

[illegible] — Incumbent

Transcript of the Hearing Before Chief Judge Edward J. Devitt on Plaintiffs' Motion to Amend the Complaint and the Defendants' Motion to Dismiss as Moot Heard [pages 7 and 8]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

November 25, 1968

The Court: On another subject, I notice that counsel's affidavit says on information and belief he has learned that you, or the attorney general, are going to persist in your viewpoint so that if some other Communist affiliated people file, you are going to take the same position.

Is there any basis for this information and belief?

Mr. Kyle: I think there probably is. At least there is no new case law which has come down which would, as far as I am concerned, dictate a different result, ultimately.

Transcript of the Hearing Before Chief Judge Edward J. Devitt on Plaintiffs' Motion to Amend the Complaint and Defendants' Motion to Dismiss as Moot Heard [page 12, line 24 through page 15, line 4]

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-256 Civil

(Caption omitted in printing)

November 25, 1968

Castner: And this brings us to what we feel is the central issue for the Court to determine, is there a controversy remaining in this case after the—after the Court has granted temporary relief?

We strongly feel that there is, and there is a case precisely in point, the Socialist Labor Party vs. Rhodes in a three-judge District Court in Ohio, cited to the Court in our briefs, which was paralleling our own case in this election, went to the United States Supreme Court and the United States Supreme Court granted temporary relief ordering the Socialist Labor Party and Governor Wallace, which was a separate case heard at the same time, placed on the Ohio ballot.

Now, that court retained jurisdiction to face the question of the constitutionality of the state laws in Ohio which made it difficult for third-party candidates to arrive on the ballot.

I think the same arguments can be made and the same equities are present with the Socialist Labor Party—in this state it's called the Industrial Government Party and the Communist Party. They're both small in size, they both have the same interests, though not the principles and platforms, but the same equities, I would argue, in participation in election, and the U. S. Supreme Court felt that the presence of laws on the books, in this case, state laws, and under United States code section 2281 they called for convening with a three-judge District Court, that their state laws and the disability that they placed on this party was sufficient to have the court continue to have jurisdiction, and we expect that there will be a decision.

For the same reason, we ask the three-judge court here to make a decision on the merits of the Communist Control Act of 1954. The election has passed, there might be another attorney general during the pendency of the action. If the court decides to retain jurisdiction and study, in a closer fashion, the merits of the Communist Control Act of 1954—

But we argue that this fact can operate to disable these plaintiffs not only in Minnesota but throughout the country, and if we are placed in the position of bringing an action each time, the attorney general could argue to the court that all you have to do is give them temporary relief, whether it's this court or a state court, if it happened to be another question, and a third party could be placed in the position of bringing a lawsuit each time it wanted to participate in an election, and stopping short of the decision of the merits of the law, which is being used to bar them from the ballot.

It is the Communist Control Act and only the Communist Control Act which the defendants have relied upon to bar the Communist Party from the ballot.

As long as that is so with this defendant, we feel it is incumbent upon the Court to make a decision of the merits of the constitutionality of that law.

Opinion and Judgment of Three-Judge Court on October 2, 1968

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

vs.

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

PATRICK J. FOLEY, United States Attorney for the District of Minnesota, Minneapolis, Minnesota, as *Amicus Curiae.*

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

This expression is occasioned by the complaint of the Communist Party candidates for President and Vice-President of the United States and others allied with them in interest[1] against Joseph L. Donovan who, as the Secretary of State of Minnesota, is the public official charged with the administration of the election machinery of the State, and Douglas M. Head, Attorney General of Minnesota, growing out of the refusal of Secretary of State Donovan to accept for filing the nominating petition for the presidential and vice-presidential candidates of the Communist Party.

The plaintiffs request temporary and permanent relief ordering Secretary of State Donovan to accept the tendered nominating petition (which allegedly contains the names of 2,394 qualified electors of the State of Minnesota), and to place the names of the Communist Party candidates on the 1968 general election ballot. Further relief is requested in the form of a declaration of the inapplicability, or in the alternative the constitutional invalidity, of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. This law is the apparent authority for the Secretary of State's refusal to accept the plaintiffs' petition.

At a hearing held September 17, 1968, briefs were filed and arguments heard relating to the jurisdiction of the court over the subject matter of the controversy and the necessity and propriety of convening a statutory three-judge court. While answers to the questions of jurisdiction and the necessity of a statutory three-judge court are

[1] The other plaintiffs are: The Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

not completely clear, the court, acting through a single judge, has made an initial determination that jurisdiction does exist, 28 U. S. C. A. §§1331, 1343, and that a statutory three-judge court should be convened to further consider the issues involved. 28 U. S. C. A. §§2282, 2284. *Flast* v. *Cohen*, 392 U. S. 83, 88 S. Ct. 1942 (1968).

Circuit Judge Harry A. Blackmun of the Court of Appeals for the Eighth Circuit, Chief District Judge Edward J. Devitt, and District Judge Philip Neville, both of the District of Minnesota, the judges designated under authority of 28 U. S. C. A. §§2282 and 2284, heard oral arguments on the issues on September 30, 1968, following notice given on September 24, 1968 to counsel for all parties and to the United States Attorney for the District of Minnesota. In accordance with the provisions of 28 U. S. C. A. 2403, the Attorney General of the United States was notified by the court that the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, was drawn in question, and was advised that he would be permitted to intervene for the presentation of evidence, if evidence were otherwise admissible in the case, and for arguments on the question of the constitutionality of the law.

Extensive briefs have been filed on the questions of jurisdiction, the necessity that the matter be determined by a statutory three-judge court, the granting of preliminary relief, and the applicability of, and the constitutionality of, the Communist Control Act of 1954.

It is not unlikely that a decision on the merits of this matter would involve a determination of the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842. Since the passage of that Act there has been scant judicial or legislative consideration of its meaning

and scope. In essence, the law contains a finding that the Communist Party and its adjuncts are a menace to the United States and should be outlawed (§841), and expresses a determination that the rights, privileges, and immunities normally attendant upon such bodies are terminated (§842).

The interdiction is broad and general in its terms, and jabs at the very core of our traditional constitutional freedoms. It is thus not a matter to be considered lightly. Its breadth and generality render its applicability to situations like the present a question not admitting of hurried solution. The results of a determination of the relevant issues on their merits may well have far-reaching national effect. The constitutionality of the Act is not settled, nor have the issues apparently involved in this case ever received authoritative judicial consideration. The Supreme Court of the United States has interpreted the Act on only one occasion. *Communist Party of the U. S. A.* v. *Catherwood*, 367 U. S. 389, 81 S. Ct. 1465 (1961). In that case a decision on the constitutional question involved was avoided. But the court did imply a criticism of "the vague terminology" of §842 of the Act. The court observed that:

> "The statute contains ino definition, and neither committee reports or authoritative spokesmen attempt to give any definition, of the clause 'rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the United States or any political subdivision thereof.'" 367 U. S. at 392, 393.

The question of validity of the Act, while not passed upon, was noted to contain "novel constitutional questions." 367 U. S. at 393. These observations might well be taken as a skeptical, if not jaundiced, view of the constitutional validity of the Act.

An examination of the expressions of the United States Supreme Court in other cases involving the control of allegedly subversive organizations, and cases in other areas involving similar constitutional doubts, may well be looked to as a harbinger of the probable view of the court if called upon in an appropriate case to pass upon the constitutionality of the Communist Control Act of 1954.

Because attempted legislative control of subversive groups and activities often involves curtailment of fundamental constitutional freedoms, the Supreme Court has required that the standards of clarity and specificity be applied with particular stringency to such statutes. At least two provisions of the Subversive Activities Control Act of 1950, sections which on their face are narrower and more specific than the statute here involved, have been stricken down as vague and overbroad. *United States* v. *Robel,* 389 U. S. 258, 88 S. Ct. 419 (1967); *Aptheker* v. *Secretary of State,* 378 U. S. 500, 84 S. Ct. 1659 (1964). See also, Note, "Recent Developments in Communist Control Act Prosecutions," 16 W. Res. L. Rev. 206 (1964).

In the case before us, issues involving rights of suffrage, free speech, and free association are involved. Only the most delicate control in such areas is to be tolerated. *Whitehill* v. *Elkins,* 389 U. S. 54, 88 S. Ct. 184 (1967); *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 328 (1963); *Cramp* v. *Bd. of Publ. Instr. of Orange Cty., Fla.,* 368 U. S. 278, 82 S. Ct. 275 (1961). Legislative exclusions of the sort here being considered may be bills of attainder. *United States* v. *Brown,* 381 U. S. 437, 85 S. Ct. 1707 (1965).

The complaint, affidavits, briefs, and the oral arguments presented have raised substantial doubts regarding the Act's applicability and constitutional validity. These doubts are of sufficient proportion to warn that hurried

arguments and precipitous decision of the issues would be unwise.

A "Memorandum for the United States as Amicus Curiae," has been filed over the signature of Patrick J. Foley, United States Attorney, advising that in his view the Communist Control Act is inapplicable to this case. He urges that the Act is meant to disable the Communist Party as a party only and not its members, and he suggests that the right of plaintiffs Mitchell and Zagarell to appear on the ballot, and the right of the nominees for presidential electors to be credited with the votes cast for Mitchell and Zagarell, depend in no degree on their status as nominees of the national or local Communist Party. He argues that, as a matter of Minnesota law, Mitchell and Zagarell are entitled to stand for office because their names have been submitted in a timely petition signed by the requisite number of qualified voters, and concludes that no "right, privilege or immunity" of the Communist Party as such is involved in this lawsuit. It is therefore his view that the Communist Control Act of 1954 does not prohibit the Secretary of State from accepting the nominating petitions and including the nominees upon the ballot as candidates of the Communist Party.[2]

The Government also cites the "familiar rule that the decision of constitutional questions should be avoided where fairly possible," *Communist Party of the U. S. A.* v. *Catherwood, supra,* and urges that we should "hesitate long" before adopting an interpretation that requires resolution of "difficult constitutional questions." 367 U. S. at 394.

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[2] At least one court, when presented with a similar problem, has observed that the Act reaches only to the prevention of the specific label, "Communist Party," from appearing on the ballot. *Salwen* v. *Rees,* 16 N. J. 216, 108 A. 2d 265 (1954).

The brief of the United States admits the seriousness of many of the plaintiffs' constitutional challenges to the law. Claims that the law is a bill of attainder, that it unjustifiably abridges First Amendment rights and the rights to vote and to run for elective office, and that Congress lacks power to establish qualifications for presidential electors are recognized as being substantial and raising difficult constitutional questions.

Because of the grave doubts which exist as to the constitutionality of the Communist Control Act, and in light of the amicus curiae position of the United States Attorney as to the inapplicability of the Act to the situation here, and his strong suggestions regarding its constitutional infirmities, it would be unwise for us, on such short notice, to attempt to resolve the issues on their merits. Additionally, it should be noted that the Attorney General of the United States, upon receipt and consideration of the statutory notice sent to him pursuant to 28 U. S. C. A. §2403, as to the pendency of the constitutional issues, may care to intervene, offer evidence, and make argument as he has a right to do. He should be afforded sufficient opportunity and time to present his views. See also, 28 U. S. C. A. §§516 and 517.

But, time is of the essence here. If a decision on the merits were not reached by October 7, 1968, probably the last date when the ballots must be delivered to the printer, the nominated candidates would not have a place on the printed ballot for the November 5, 1968 general election, and the plaintiffs, assuming some merit in their contentions, would be deprived of their individual constitutional rights. The plaintiffs have also sought to show that the lack of an expeditious resolution of the issues involved will

substantially impede their proposed electioneering campaign in Minnesota.

On the other hand, the defendants have not urged, nor is there apparent, any grave or irreparable harm which would result from the grant of the requested temporary relief directing the placement of the Communist Party ticket on the ballot pending final disposition of the issues. It has been there several times before with unimpressive voter response.[3]

Thus, while the court finds and concludes that possible serious injury will accrue to the plaintiffs if the names of Charlene Mitchell and Michael Zagarell as Communist Party candidates for President and Vice-President do not appear on the printed ballot, it has found no discernible probable injury which the defendants or the citizens of Minnesota will suffer if these names are placed on the ballot. A well-informed, intelligent electorate such as exists in the State of Minnesota undoubtedly will be able fairly to discern and make appropriate decision upon the merits of the principles advocated by the Communist Party candidates and their sponsors.

IT IS THEREFORE ORDERED

That the defendant, Joseph L. Donovan, as Secretary of State of Minnesota, absent any prohibitive Minnesota law,

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[3] According to the records in the office of the Minnesota Secretary of State, the Communist Party vote for President in Minnesota for the years 1924-1940 is as follows:

			Voting
1924	William Z. Foster—Workers Party	4,427	835,002
1928	William Z. Foster—Workers Communist	4,853	999,823
1932	William Z. Foster—Communist	6,101	1,003,009
1936	Earl Browder—Communist	2,574	1,120,179
1940	Earl Browder—Communist	2,711	1,257,491

accept for filing the nominating petition of the plaintiffs and, if upon examination thereof he determines that the petition complies in all respects with the requirements of the pertinent Minnesota statutes, he is directed to cause the names of the plaintiffs, Charlene Mitchell and Michael Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States, to be placed on the ballot for the November 5, 1968 general election.

This expression is intended to comply with Rule 52 of the Federal Rules of Civil Procedure.

The Clerk is directed to return the nominating petition to plaintiffs' counsel.

Dated: October 2, 1968.

HARRY A. BLACKMUN
Harry A. Blackmun, *Circuit Judge*

EDWARD J. DEVITT
Edward J. Devitt, *Chief District Judge*

PHILIP NEVILLE
Philip Neville, *District Judge*

Neville, District Judge.

I concur in the action taken by the court since it grants purely temporary relief. Personal disagreement on my part with the philosophy and teachings of Communism obviously does not furnish an answer to the question presented in this lawsuit. Assuming, as I do, the validity and truth of the findings made by Congress and recited in the Communist Control Act of 1954, the court nevertheless is urged by plaintiffs to declare the Act unconstitutional. Congress declared the Communist Party to be "an instrumentality of a conspiracy to overthrow the Government of the United States," whose policies and programs "are secretly prescribed for it by the foreign leaders of the world Communist movement." Its existence was found to be "a clear present and continuing danger to the security of the United States" and the statute concludes "Therefore, the Communist Party should be outlawed."[1] The question of the validity of the Communist Control Act goes to the very bowels of our constitutional framework.

I would prefer to bottom jurisdiction on 42 U. S. C. §1983 (Civil Rights Act) and 28 U. S. C. §1343 rather than on 28 U. S. C. §1331. Although in voting cases, proof of the monetary value of the denial of the right to vote to one or to many people perhaps can or at least might well be presumed to be worth the jurisdictional $10,000 amount, sections 1983 and 1343 require no financial amount to be involved. It seems clear to me that the Secretary of State here acted "under color of [a] statute" of Minnesota. The action of the Secretary of State determining that a statute permitting filing as a political candidate by petition[2] did not

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[1] 50 U. S. C. §841.

[2] Minn. Stat. §202.09.

apply, for whatever reason, is acting under color of state law. Failure or refusal to apply a law is as much "action under color of law" as is the reverse. Also I agree that a three-judge court is proper.

I take issue with the court's opinion insofar as it expresses *grave* doubts as to the constitutionality of the Communist Control Act. I do not mean to say that it is free from all doubt. Further I believe that the United States Supreme Court, if and when it considers this case, may well conclude that if it permits the Communist Party to be on the ballot little, if anything, will be left of the Communist Control Act. Nevertheless I subscribe to the temporary relief granted by this court because of the shortness of time, the inability fully to study the problem and all its facets, and the belief that, balancing the equities, less harm results from granting the temporary relief than denying it.

Philosophically in a true democracy the majority should rule and whatever it votes or determines should prevail. Yet inherent in this concept are the seeds of self-destruction. Should the majority vote into power persons who avowedly urge and effect the overthrow of the present form of government, then no longer is there a democracy or the Republican Form of government guaranteed to the states by the United States Constitution.[3] Under the "clear and present danger" test prescribed by Holmes,[4] Congress found, or at least expressed the fear, that such might happen.

Philosophers and political scientists have pointed to the "paradox of freedom" and have held to the view that the

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[3] U. S. Const. art. IV §4.

[4] *Schenck* v. *United States*, 249 U. S. 47, 52 (1919).

principle of freedom cannot require that one can make the decision not to be free. It is not freedom to be allowed to destroy freedom.[5] It has been said that the best test of truth is the power of thought to get itself accepted in the marketplace. Many contend, however, that a democratic form of government should protect its freedom from those who disbelieve in its theory and would abandon and deny traditional civil liberties.

The court's opinion herein notes that the Supreme Court has held restrictions on the activities of individual Communists unconstitutional in situations where the statute attempted to prohibit an avowed Communist from working in a defense plant;[6] from holding an office in a labor union;[7] from obtaining a passport;[8] and in another case where benefits were sought to be denied the Communist Party as an employer under state unemployment laws.[9] These cases are, it seems to me, distinguishable, and relate to the movement and civil rights of particular individuals and are quite separate from and not precedent for the question of whether by the ballot we should give our democracy the right by democratic process to vote to destroy itself.

This most difficult question need not be and is not now decided. I feel, however, that while doubts as to constitutionality are not nearly as grave as the court's opinion

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[5] See Auerbach, The Communist Control Act of 1954, 23 U. CHI. L. REV. 173 (1956) containing a discussion at 188 et seq. on the freedom to abdicate liberty. A number of writers holding generally to this view are cited and quoted. See also Comment, The Communist Control Act of 1954, 64 YALE L. J. 712, 738 (1955).

[6] *U. S.* v. *Robel*, 389 U. S. 258 (1967).

[7] *U. S.* v. *Brown*, 381 U. S. 437 (1965).

[8] *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964).

[9] *Communist Party* v. *Catherwood*, 367 U. S. 389 (1961).

would indicate,[10] small harm can come from permitting the candidates to be on the ballot for this particular election; whereas if they are excluded and the court should be in error in such a decision some persons will have been deprived of their right to be candidates and others of their right to vote for such candidates. Therefore, I concur.

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[10] *Dennis* v. *United States*, 341 U. S. 494, 509 (1951), wherein the Court said:

> "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when leaders feel the circumstances permit, action by the Government is required."

But see *Communist Party* v. *Control Board*, 367 U. S. 1 (1961), dissenting opinion of Justice Black at 137:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. . . ."

Opinion and Judgment of Three-Judge Court on July 14, 1969

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA—THIRD DIVISION

No. 3-68-Civ-256

CHARLENE MITCHELL, *et al.*,

Plaintiffs,

—vs.—

JOSEPH L. DONOVAN, *et al.*,

Defendants.

LYNN S. CASTNER, Minneapolis, Minnesota, attorney for plaintiffs.

DOUGLAS M. HEAD, Attorney General of Minnesota, RICHARD H. KYLE, Solicitor General of Minnesota, and DAVID J. BYRON, Special Assistant Attorney General of Minnesota, all of St. Paul, Minnesota, attorneys for defendants.

Before:

CIRCUIT JUDGE BLACKMUN, CHIEF DISTRICT JUDGE DEVITT, and DISTRICT JUDGE NEVILLE.

DEVITT, *Chief District Judge.*

We concern ourselves here with the propriety of entertaining that portion of plaintiffs' complaint seeking declaratory relief based on issues arising from the conduct of the

1968 Presidential Election in Minnesota as it pertained to candidates running under the banner of the Communist Party. Defendants move for dismissal, asserting mootness.

This action, for injunctive and declaratory relief, was commenced in September, 1968 by Charlene Mitchell, the Presidential candidate of the Communist Party, and others,[1] against Secretary of State Donovan and Attorney General Head, of the State of Minnesota. The plaintiffs sought an order requiring Secretary Donovan to place the names and party designation of the Communist Party candidates for President and Vice-President of the United States on the ballot for the general election of November 5, 1968. Additionally, the plaintiffs sought a declaration that the Communist Control Act of 1954, 50 U. S. C. A. §§841 and 842, the purported authority for the defendants' refusal to accept plaintiffs' nominating petition, is inapplicable to the present situation, or in the alternative, is constitutionally invalid.

In response to the original complaint, probable jurisdiction was noted, 28 U. S. C. A. §1343, and a statutory three-judge court was convened, 28 U. S. C. A. §§2282, 2284, to consider further the issues raised by the pleadings. After oral arguments, and study of briefs from the parties and the United States Attorney as *amicus curiae*, the court, in a memorandum opinion and order dated October 2, 1968, granted temporary relief in the form of an order directing defendant Donovan, as Secretary of State of Minnesota, to accept for filing the nominating petition of plaintiffs, and upon a finding that the petition complied

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[1] The other plaintiffs are: the Vice-presidential candidate of the Communist Party, the Communist Party of the United States, the Communist Party of Minnesota, ten nominated candidates for the office of presidential elector, two petitioners for such nominations, and an eligible voter of the State of Minnesota.

in all respects with the pertinent Minnesota statutes, to place the names of plaintiffs Mitchell and Zagarell, as Presidential and Vice-Presidential candidates of the Communist Party of the United States on the ballot for the November 5, 1968 general election. That Memorandum and Order, containing a more detailed exposition of facts and reasoning, is reported as *Mitchell* v. *Donovan,* 290 F. Supp. 642 (D. Minn. 1968).

By affidavit with attached exhibits, it appears that defendant Donovan complied with the order of this court, and that the November 5, 1968 general election ballot contained the names "Mitchell and Zagarell" with the subdesignation "Communist Party USA/Nominated by Petition." [2]

On October 10, 1968, the plaintiffs moved to amend their complaint by adding allegations that the Communist Party plans to participate in Minnesota local, state, and national elections which occur after November 5, 1968, and that upon "information and belief," it appears that Attorney General Head will continue to advise Minnesota election officials that the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842 bars the Communist Party or any candidates running under its express endorsement from participating in any and all Minnesota elections.

One week after the November 5, 1968 general election the defendants moved to dismiss the complaint on the ground that "the issues involved in this litigation have become moot and that there is no longer any justiciable issue to be tried before this court."

In our view the issues raised by the original pleadings are now moot since the 'plaintiffs' nominating petitions

[2] The plaintiff Mitchell and her running mate tallied 415 votes.

were accepted and their names and their party designation were placed on the ballot for the 1968 Presidential elections.

By their tendered amendment to the complaint, plaintiffs seek to have us rule for the future on the constitutionality of the Communist Control Act of 1954, 50 U. S. C. A. §§841, 842, on the theory that Communist Party candidates may seek some position on a Minnesota ballot in some future election and that the person who is Attorney General of Minnesota at that time may take a position that the provisions of the Communist Control Act of 1954 prevent such filing.

We readily allow the motion to amend the complaint, yet view the issues thus shaped as inappropriate for adjudication and dismiss the complaint because, in our view, such issues do not present a "controversy" as required by the United States Constitution, Article III, and the express language of the Declaratory Judgment Act, 28 U. S. C. A. §2201.[3]

It is fundamental that the Declaratory Judgment Act provided a judicial remedy, but did not repeal the cardinal standard of federal jurisdiction that a federal court may not decide what is not a "case or controversy." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 61 S. Ct. 510 (1941); *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461 (1937). In *Maryland Casualty*, the Court said:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judg-

[3] "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall be reviewable as such."

ment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 312 U. S. at 273.

That constitutional hurdle demanding the existence of an actual case or controversy was in no sense abated by the Declaratory Judgment Act. In fact, the course of a federal litigant seeking declaratory relief is in a sense the more exacting, for,

"the Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so." *Public Affairs Assoc., Inc.* v. *Rickover,* 369 U. S. 111, 112, 82 S. Ct. 580 (1962).

Put in another way, the Declaratory Judgment Act,

"is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Ser. Comm'n of Utah* v. *Wycoff Co.,* 344 U. S. 237, 241, 73 S. Ct. 236 (1952).

Here are guideposts which the United States Supreme Court has set as to when declaratory relief should be granted.

"(W)hen all of the axioms have been exhausted and all the words of definition have been spent, the propriety of declaratory relief in a particular case will

depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the function and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting the relief in the cases for which it is designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature intervention, especially in the field of public law. A maximum of caution is necessary in the type of litigation we have here, where a ruling is sought that would reach far beyond the particular case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed or final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Ser. Comm'n of Utah* v. *Wycoff Co., supra,* 344 U. S. at 243-4.[4]

Applying these principles to this case, it appears to us that no issue is here ripe for decision; that a disagree-

[4] Chief Justice Hughes expressed similar principles many years before in *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227 (1937) as follows:

"The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature.' (citations omitted) . . .

"A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal

ment, if it exists between the litigants, is nebulous and conjectural, not fixed and final in shape; and that no useful purpose would be served by a declaration of rights.

It is not at all certain that candidates will seek to run on the Communist Party Ticket at the next or at subsequent elections, albeit the affidavit of Mrs. Betty M. Smith, the State Secretary of the Minnesota Communist Party, alleges such future intention. From 1949 to 1968, no person sought to run on the Communist ticket in Minnesota for any public office. Of course, it is certain that future elections will be staged in Minnesota, but the bare certainty that future elections will be held is not enough *Fair* v. *Dekle,* 367 F. 2d 377 (5th Cir. 1966), *cert. den.* 386 U. S. 996.

But even assuming that some candidate were to run for some office under the label of the Communist Party at some future election, it is not certain that at such future election the then Attorney General of Minnesota will be the same person who now holds that office or, if so, that he will take the same legal position that was taken by the Minnesota Attorney General in connection with the 1968 election. The present Minnesota Attorney General has not said he will view the Communist Control Act of 1954 as prohibiting persons from seeking ballot positions in future elections. In view of the now expressed opinion of the legal officers of the United States Government that the Communist Control Act of 1954 does not apply to the plaintiffs, it is doubtful if the Attorney General of Minnesota will presume to take a contrary position involving the interpretation of this federal statute at a future election.

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interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." 300 U. S. at 239-241.

The plaintiffs cite several decisions involving voting rights cases, particularly some just decided or now pending in the United States Supreme Court[5] as authority for the proposition that this court should entertain and adjudicate this case. In each of the cited cases, however, the plaintiffs were suffering under an adverse lower court ruling, the appeals were all perfected prior to the November 5, 1968 election, the issues were fixed and final in shape, and most important of all, these cases involve firmly-imbedded state policies concerning election rights as expressed in the statutes of the States involved.

There is no firmly-imbedded state policy in Minnesota as expressed by statute or otherwise at issue here, but only the possibility of a future adverse legal opinion by a then Attorney General of Minnesota on an uncertain issue as yet unformed. The statute involved is a federal, not a state, one. As noted, the view of the chief legal officer of the United States, speaking through his United States Attorney, is that the constitutionality of the Communist Control Act of 1954 is not involved and, in his view, the statute by its application does not prohibit the plaintiffs from the positions on the ballot which they sought.

So, in summary,

1. The issue as originally framed is moot because the election is over and plaintiffs were on the ballot as requested.

2. As to the future, there is no certainty or finality as to the issues sought to be adjudicated because there is no

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[5] See e.g., *Moore* v. *Ogilvie*, —— U. S. ——, 89 S. Ct. 1403, 37 U. S. L. W. 4389 (May 5, 1969); *Hadnott* v. *Amos*, —— U. S. ——, 89 S. Ct. 1101 (1969); *Allen* v. *State Board of Electors*, 393 U. S. 544, 89 S. Ct. 817 (1969); *Brockington* v. *Rhodes*, probable jurisdiction noted, 393 U. S. 1078, 89 S. Ct. 877 (1969).

certainty as to whether any future candidates for office in a Minnesota election may seek to run under the banner of the Communist Party and if they do, that the issues formed by their attempted filing may be the same as they are in this lawsuit. Further, there is certainty that the issues sought to be adjudicated in the present lawsuit will be similarly viewed by the Attorney General of Minnesota holding office at the time of a future election. The issues as raised by the pleadings do not represent any fixed or firm state policy governing elections which should be examined. In our view, therefore, the issues upon which decision is requested here, are nebulous and contingent—not fixed and final—as required by the Supreme Court.

3. At all events, no constitutional issue has been definitely joined in the present lawsuit because the United States Attorney General, charged with the duty of defending the constitutionality of the statutes of the United States, expressed the view that no constitutional issue was present and agreed with the plaintiffs that a proper interpretation of the law is that the plaintiffs were entitled to be placed on the ballot at the 1968 election as they requested. The United States Attorney General agrees with the plaintiffs' view of the law: the Minnesota Attorney General, by his motion for dismissal, does not care to contest the issue. In such a stance, who is there to oppose the plaintiffs?

4. No useful purpose would be served by a declaration of rights.

In the words of Justice Brennan, in a most recent decision of the United States Supreme Court, the constitutional question, if one exists,

". . . must be presented in the context of a specific live grievance." *Golden v. Zwickler*, —— U. S. ——, 89 S. Ct. 956, 960 (1969).

And, as the United States Supreme Court said in *United Public Workers of Amer. (CIO) v. Mitchell*, 330 U. S. 75, 67 S. Ct. 556 (1947):

"The power of courts . . . to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." 330 U. S. at 89-90.

All the plaintiffs assert here is a "hypothetical threat" of a possible constitutional issue as yet unframed.

There is no "actual controversy" as is required by the Constitution, by a long line of Supreme Court decisions, and by the express wording of the Declaratory Judgment Act.

The complaint is therefore DISMISSED.

Dated: 7/14/69

HARRY A. BLACKMUN, *Circuit Judge*

EDWARD J. DEVITT, *Chief District Judge*

PHILIP NEVILLE, *District Judge*